



BP EXPLORATION & PRODUCTION, INC.

172 IBLA 372

Decided September 28, 2007



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

BP EXPLORATION & PRODUCTION, INC.

IBLA 2005-33

Decided September 28, 2007

Appeal from the final decision of the Minerals Management Service, assessing civil penalties in connection with a loss of well-control event. MMS OMMG-2004-02; Civil Penalty Case No. G-2004-003.

Affirmed in part; reversed in part.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

Where the record establishes that, during a loss of well-control event, a diverter was inoperable from a remote control station when in “test” mode and the crew lacked sufficient knowledge and training concerning use and operation of the diverter system, safety regulations promulgated pursuant to the Outer Continental Shelf Lands Act were violated. Such violations constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment, justifying the assessment of civil penalties without regard to notice and an opportunity for corrective action.

APPEARANCES: Jonathan A. Hunter, Esq. and Kelly B. Becker, Esq., New Orleans, Louisiana, for appellant; Frank A. Conforti, Esq., Office of the Solicitor, the Minerals Management Service, U.S. Department of the Interior, Washington, D.C.

OPINION BY ADMINISTRATIVE JUDGE M<sup>C</sup>DANIEL

BP Exploration & Production, Inc. (BP) has appealed the August 26, 2004, final decision of the Reviewing Officer (Final Penalty Assessment Decision), Gulf Of Mexico, Outer Continental Shelf (OCS) Region, assessing civil penalties in the

amount of \$59,000 for two Incidents of Non-Compliance (INCs), in connection with a loss of well-control event on an OCS drilling platform off the Louisiana coast. The INCs were issued for two violations: (1) a diverter that was inoperable from a remote control station when in “test” mode; and (2) the lack of sufficient crew knowledge and training concerning use and operation of the diverter system.

## I. BACKGROUND

### A. Factual Background

BP is the lessee and operator of oil and gas lease OCS G-4003. In November 2002, the Diamond Offshore Drilling, Inc. (Contractor) drilling rig Ocean King (Ocean King), was engaged in drilling operations for BP on Grand Isle Block 90 Well C-7ST, from the Grand Isle 93 “C” platform (platform). “Investigation of Loss of Control, Grand Isle Block 90, Well C-7ST, OCS-G 4003, November 14, 2002,” OCS Report MMS 2003-068, October 2003 (OCS Incident Report) at 1 (AR 275<sup>1</sup>).

On November 14, 2002, the surface casing of the well had been set and cemented to the surface for 3 hours when, at 2:30 a.m., gas and some fluid began flowing from the surface/conductor casing annulus. At 2:55 a.m. the well was shut in by placing the Reagan KFDJ diverter system into “test” mode to apply back pressure in an attempt to allow the cement to cure. Annulus pressure then built up to 400 psi and the flowline seals started to leak. Despite intermittent bleeding of the pressure, seepage of fluid was observed and the hissing sound of escaping gas was heard from around the flowline seals as the annular pressure mounted to 580 psi. This prompted the evacuation of 50 non-essential personnel from the rig at 3:15 a.m. Attempts to open the diverter vent to relieve the rising pressure or to contain the diverter flowline seal leak by increasing the closing pressure failed when the diverter system “test” mode could not be overridden from the remote control station in the Offshore Installation Manager’s (OIM’s) office. Nor could the diverter flowline seal pressure be controlled from the remote site. At 5:15 a.m., with gas detected on the rig floor, pressure rising, and failed attempts to control or relieve the pressure from the remote station, all remaining crew were evacuated from the rig and platform. The last pressure monitored before evacuating the remaining crew was 340 psi. *Id.* at 3-4; IADC Daily Drilling Report 14-Nov-02, AR 123; Diamond Offshore Memorandum dated July 28, 2003 (Diamond Memorandum), AR 44.<sup>2</sup> John Daley, the OIM, “was unsure of the maximum pressure allowed on the flowline seals. Once pressure rating was confirmed, attempts to go back to the rig floor were negated because of

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<sup>1</sup> AR refers to the Administrative Record of Civil Penalty Case No. G-2004-003 (Case File) which is the subject of this appeal and contains stamped page numbers.

<sup>2</sup> In this Diamond Memorandum, BP’s Contractor responded to questions posed by MMS about the incident.

[explosive limit] meter readings via a hand held meter employed by the approach team.” Diamond Memorandum, AR 44. By November 16, 2002, personnel had re-boarded the rig and contained the leaking seal elements. Normal drilling operations were resumed by November 22, 2002. OCS Incident Report at 4.

In its investigation following the incident, an MMS incident investigation panel found:

The incident consisted of a surface and subsurface loss of control of shallow natural gas during surface casing cementing operations. The loss of control precipitated a rig evacuation. No pollution, injuries, or damage resulted from the incident.

....

*[]The crew was unaware that the ‘test’ mode disabled the remote station diverter control.*

....

The crew did not have sufficient knowledge about flowline seal pressure capabilities, flowline seal pressure activation, diverter packer element pressure capabilities, and the details of operating the system under “test” conditions.<sup>3</sup>

OCS Incident Report at 15-17.

BP later hired petroleum engineer Adam T. Bourgoyne to analyze the incident. He prepared a report dated June 3, 2004 (Bourgoyne Report), in which he acknowledged that, after using the diverter in “test” mode to shut in the well, BP discovered that the remote control for the diverter (rather than the main diverter control located on the rig floor) was rendered inoperable when the diverter was placed in that mode.<sup>4</sup> Bourgoyne Report at 6 (AR 105). BP also acknowledged that

<sup>3</sup> The MMS panel relied on documentation and physical evidence and on interviews with personnel involved in the event, as well as Operator and Contractor management and engineering personnel. OCS Incident Report at 2. Interview summaries along with the Diamond Memorandum and other documents were enclosed with a letter to BP from the Reviewing Officer dated Aug. 18, 2004. AR 34-52.

<sup>4</sup> Bourgoyne explained that “[t]he ‘test’ mode of the KFDJ Model J Diverter system interrupts the control system pilot pressure to disable valve function interlocks and is  
(continued...)

“[t]his situation possibly could have been avoided had the contractor personnel on board the Ocean King been more familiar with the Reagan Diverter.” “GI 90 C-7 ST-1 Gas Release,” BP report dated June 13, 2003, at AR 183. Further, BP had been aware of the shallow gas risk/hazard associated with drilling from this platform due to another loss of well-control incident which had occurred on this platform in August 2002.<sup>5</sup> As a result of that event, BP included a reference to the risk/hazard in its well plan. “BP/Vastar Resources, Inc. Well Plan,” AR 183-86, 188.

On 8 August 2002, during BP’s drilling operations on the first well in the program, the C-4 ST, a loss of control during drilling caused by an influx of shallow-gas from the ‘2,660-ft Sand’ resulted in a diverter incident, fire, and evacuation of the Rig. The Rig sustained approximately \$2,000,000 in direct damages (see MMS Panel Report No. MMS 2002-023).

OCS Incident Report at 5.

*B. Procedural Background*

MMS issued BP INCs on November 11, 2003, in connection with the loss of well-control which occurred on November 14, 2002. It cited three violations:

- Violation of 30 C.F.R. § 250.1503(a): “The operator failed to verify that its employees understood and could properly perform their assigned well-control duties prior to engaging in drilling operations . . . . The operator’s employees failed to properly use the Reagan KFDJ diverter system during the well-control event which occurred on November 14, 2002.”
- Violation of 30 C.F.R. § 250.409(c) (2002)<sup>6</sup>: “Failure to insure that the diverter system was equipped with remote controlled valves in the flow and vent lines that can be operated from at least one remote control station in addition to the one on the drilling floor.”

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<sup>4</sup> (...continued)

normally used when the diverter is pressure tested. Unfortunately, the ‘test’ mode also disables the remote panel.” Bourgoyne Report at 6.

<sup>5</sup> Also, MMS promulgated a Safety Alert entitled “Shallow Gas Flows While Cementing Surface Casing,” dated Apr. 3, 1995. AR 300-302.

<sup>6</sup> This regulation was amended in 2003 and is now 30 C.F.R. § 250.431 (2003). For the remainder of this decision, all citations are to the rules applicable to lessees on Nov. 14, 2002, found in the 2002 volume of the Code of Federal Regulations.

- Violation of 30 C.F.R. § 250.415(a) (2002)<sup>7</sup>: “Operator failed to conduct operations in accordance with the approved application. Diverter procedure in the approved permit stated ‘No attempt will be made to shut in the well with only structural (drive pipe and/or conductor) casing strings set.’”

MMS sent to BP the Reviewing Officer’s Notice of Proposed Civil Penalty Assessment (Proposed Penalty Assessment) dated March 25, 2004, with enclosed copies of the Civil Penalty Worksheet and Case File. MMS proposed assessment of penalties totaling \$270,000, with \$220,000, \$25,000, and \$25,000, respectively, assessed for each of the three INCs, and it provided BP with the opportunity to present its objections before a decision on civil penalties was finalized.<sup>8</sup> AR 175-78. In addition to meeting with MMS on June 17, 2004, concerning the proposed penalties, BP provided to MMS its written response, arguing that

the three INCs at issue concern matters that did not either *cause* or *constitute a threat of* “serious, irreparable, or immediate harm . . .” under the Outer Continental Shelf Lands Act [], 43 U.S.C. § 1350(b)(2), and applicable MMS regulations . . . [B]ecause the “threat of serious harm” that is indispensable to any assessment of civil penalties was not present, civil penalties should not be imposed.

BP Response to Notice of Proposed Civil Penalty Assessment (BP Response) at 1 (AR 85). BP relied on Bourgoyne’s analysis in which he concluded, among other things, that

2. The event did not place personnel, the environment, or rig and platform facilities in imminent danger to explosion or broaching of hydrocarbons through the shallow sediments to the surface. . . .
4. [N]either shutting-in the well nor diverting the gas flow would have led to gas broaching to the surface. . . . Significant sand intervals were present both above and below the conductor casing shoe that

<sup>7</sup> This regulation was amended in 2003 and is now 30 C.F.R. § 250.410 (2003).

<sup>8</sup> The proposed penalties were calculated as follows:

30 C.F.R. § 250.1503(a) (2002): The proposed violation period began the day the well was spudded on Nov. 4, 2002, until the loss of well-control event on Nov. 14, 2002 (11 days). A civil penalty was assessed in the amount of \$20,000 per day for this 11-day period, for a total of \$220,000;

30 C.F.R. § 250.409(c) (2002): A civil penalty was assessed in the amount of \$25,000 for a 1-day violation of this regulation; and

30 C.F.R. § 250.415(a) (2002): A civil penalty was assessed in the amount of \$25,000 for a 1-day violation of this regulation.

were more than capable of dissipating any gas produced from the thin gas-bearing zone that caused the leak.<sup>9]</sup>

Bourgoyne Report at 4.

The MMS Reviewing Officer issued the Final Penalty Assessment Decision on August 26, 2004. She dismissed the third INC listed above concerning failure to conduct operations in accordance with the approved diverter procedure under 30 C.F.R. § 250.415(a) (2002), explaining that BP's "placing the diverter in 'test' mode to contain the flow did not clearly violate MMS regulations" because "MMS does not have regulations that specifically address step by step requirements regarding actions to take when shallow gas flow is encountered while waiting on cement (WOC)." Final Penalty Assessment Decision at 3-4.

The Reviewing Officer sustained the other two INCs, but reduced the penalties for each. She found that BP violated 30 C.F.R. § 250.1503(a) because, due to inadequate training, its or its Contractor's employees were not familiar with the diverter system when placed in "test" mode in order to shut in the well. She also found that BP violated 30 C.F.R. § 250.409(c) (2002) for not having remote-controlled valves in the diverter's flow and vent lines operable from a remote-control station when the diverter system was placed in "test" mode to shut in the well. The Reviewing Officer concluded that these two violations "constituted a threat of serious, irreparable, or immediate harm or damage to life, property, and the environment." Final Penalty Assessment Decision at 4.

The Reviewing Officer reduced the proposed penalties from \$270,000 to \$59,000 for several reasons. She found that

the diverter would have only been used to shut in the well during WOC operations. Therefore, the threat associated with the violation existed only on November 6, 2002, (WOC for conductor casing) and again on November 14, 2002, (WOC for surface casing) for a total of two days, rather than the 11 days originally used to calculate the proposed assessment.

Final Penalty Assessment Decision at 5. She also mitigated the proposed assessment "due to the dismissal of the 30 C.F.R. § 250.415(a) [2002], violation and . . . due to

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<sup>9</sup> Bourgoyne also mentioned that "[w]eather records from a nearby weather buoy indicate that while the personnel were on the rig and platform, the wind direction and speed was [sic] sufficient to carry the gas away from the quarters." Bourgoyne Report at 9. As noted by MMS, the weather buoy he relied upon was located about 80 miles away from the rig. Answer at 19.

the factors discovered and discussed in Dr. Bourgoyne's report." *Id.* at 7. Thus, the final assessment was reduced from \$20,000 to \$18,000 per day for violating 30 C.F.R. § 250.1503(a) for 2 days, totaling \$36,000; and from \$25,000 to \$23,000 per day for violating 30 C.F.R. § 250.409(c) (2002), on the date of the incident, November 14, 2002. *Id.*

## II. BP'S ARGUMENTS ON APPEAL

On appeal BP argues that civil penalties are inappropriate because there was no actual threat of serious harm. BP relies on Bourgoyne's opinion that "the gas leak that occurred was small and did not constitute imminent danger to personnel or facilities." SOR at 17, *quoting* Bourgoyne Report at 9. BP contends that "the alleged violations were not the source of the 'uncontrolled release of gas.' Rather, the release of gas that commenced during the 'waiting on cement' phase of operations on the C-7ST well was a natural by-product of (i) the characteristics of the subsurface formations, combined with (ii) the effect of BP's MMS-approved drilling operations." SOR at 23. BP further argues that "because the Final Decision on its face fails to make the requisite causal connection between the alleged 'threat' and the alleged 'violation,' as a matter of law civil penalties cannot be imposed." *Id.* at 24.

BP also argues that the diverter and training regulations that MMS claims it violated apply only during drilling operations, not during the WOC operations that were occurring here, and even if they do apply, the diverter rule is unclear and therefore no penalties should be assessed for it. *Id.* at 26-27, 29. BP further claims that the training regulation does not speak to diverters or to shallow gas flow, that the crew was fully trained, and that the regulation could not be applied to violations within 2 weeks to 1 month after its effective date. *Id.* at 30-31.<sup>10</sup> BP further argues that it should have been given notice and an opportunity to correct violations before assessing penalties. *Id.* at 33-34. BP claims that BLM improperly relied on the MMS investigation and the witness interview summaries from the investigation, and that the Bourgoyne Report should have been given more evidentiary value. *Id.* at 16-17, 20-22, 30.

In addition, BP objects to how the penalty amount was assessed. It argues that the "assessment matrix' contained in MMS' Notice to Lessees ('NTL') No. 2004-N01"<sup>11</sup> is a "substantive rule" because it directs the method for arriving at "the

<sup>10</sup> The regulation at 30 C.F.R. § 250.1502, which became effective Oct. 13, 2000, provided a 2-year transition period, until Oct. 15, 2002, to come into compliance with the training requirements. 30 C.F.R. § 250.1502.

<sup>11</sup> The matrix is contained in the OCS Civil/Criminal Penalties Program Policy and (continued...)

amount of civil penalties imposed” and, as such, cannot be applied in penalty assessment without first undertaking the notice and comment procedures required by the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* SOR at 37-38. Likewise, BP argues that “MMS’ system for the inspection of offshore facilities and any resulting INC’s and civil penalty assessments are . . . ‘guidelines’ that the agency should have [adopted] pursuant to the APA notice and comment requirements. See MMS National Office Potential Incident of Noncompliance (PINC) List . . . .” *Id.* at 38.<sup>12</sup>

Finally, BP claims that no civil penalty worksheets were included with the Final Penalty Assessment Decision and that the worksheets attached to the Proposed Penalty Assessment were inadequate because of the major reduction made in the penalty amount in the Final Penalty Assessment Decision. *Id.* at 39-40.

MMS disagrees with all of BP’s arguments except one: It requests that the Board reverse the Final Penalty Assessment Decision as to the violation of 30 C.F.R. § 250.1503(a) for November 6, 2002, and vacate the accompanying penalty assessment of \$18,000. MMS agrees that since BP did not place the diverter in “test” mode on November 6th, its personnel were not “outside their training and knowledge” on that date, contrary to the findings of the Reviewing Officer. MMS requests that we vacate this aspect of the decision and that the total penalty be reduced from \$59,000 to \$41,000. Answer at 13 n.6.

### III. ANALYSIS

This case raises issues concerning a policy enunciated in the Outer Continental Shelf Lands Act, *as amended*, (OCSLA or Act), 43 U.S.C. §§ 1331-1356 (2000), which states:

operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users

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<sup>11</sup> (...continued)

Procedures Guidebook (May 2002). AR 303. See Answer at 22 n.18. A copy of the matrix was sent to all lessees in NTL No. 97-5 N, which was in force at the time and was later replaced by NTL No. 2004-N01 due to inflation, as required by 43 U.S.C. § 1350(b)(1) (2000). MMS Answer at 22 n.18.

<sup>12</sup> MMS’ Potential Incident of Noncompliance (PINC) list contains step-by-step guidelines for compliance inspections of OCS facilities and operations. See Answer at 26-27, *citing* Answer Ex. 1.

of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1332(6) (2000); *see also* 43 U.S.C. § 1332(5) (2000); 43 U.S.C. § 1348(b) (2000); *Petro Ventures, Inc.*, 167 IBLA 315, 321-22 (2005); *Seneca Resources Corp.*, 167 IBLA 1, 2 (2005); *W & T Offshore, Inc.*, 164 IBLA 193, 194 (2004). The OCSLA authorized the Department to promulgate safety regulations to implement this OCSLA safety-related policy, which it has done in 30 C.F.R. Part 250. Congress also authorized the Department to assess civil penalties after notice and an opportunity for correction for regulatory violations. 43 U.S.C. § 1350(b)(1) (2000). However, Congress drew a distinction in the OCSLA between violation of regulatory requirements that are designed to promote safety and those that are not. For the former, Congress authorized assessment of civil penalties without regard to notice and an opportunity for corrective action when the regulatory violation constitutes a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment. 43 U.S.C. § 1350(b)(2) (2000); *Petro Ventures*, 167 IBLA at 322; *see Seneca Resources*, 167 IBLA at 4; *W & T Offshore*, 164 IBLA at 194.

Here BP is charged with violation of the following two regulations designed to promote safety:

- 30 C.F.R. § 250.409(c) (2002) (the diverter regulation) provides that when drilling a conductor or surface hole, “[t]he diverter system shall be equipped with remote-controlled valves in the flow and vent lines that can be operated from at least one remote-control station in addition to the one on the drilling floor.”
- 30 CFR § 250.1503(a) (the training regulation) contained in the “Subpart O–Well Control and Production Safety Training” provisions which are designed to ensure that OCS operations are “safe and clean.” 30 CFR §§ 250.1500-1510 (2002). 30 CFR § 250.1503(a) provides:

You must establish and implement a training program so that all of your employees are trained to competently perform their assigned well control and production safety duties. You must verify that your employees understand and can perform the assigned well control or production safety duties.

Both of these regulations promote the safety of rig operations. By requiring that a diverter system be equipped with remote-controlled valves that can be

operated from at least one remote control station in addition to the one on the drilling floor, 30 C.F.R. § 250.409(c) (2002) allows the crew to evacuate the drilling floor for its safety and still maintain control over the diverter system. Similarly, by requiring that an operator's employees be trained to competently perform their assigned well control and production safety duties, 30 C.F.R. § 250.1503(a) ensures that the crew understands how to use and control the diverter system from a remote location, including when it is placed in "test" mode to shut in a well, BP's argument that the rule does not expressly speak to diverters or to shallow gas flow, notwithstanding. SOR at 29.

BP contends that it should have been given notice and an opportunity to correct the violations before assessment of penalties. However, as explained above, the OCSLA is designed to promote safety by authorizing assessment of civil penalties without notice and opportunity to correct safety-related violations, such as those involved here. 43 U.S.C. § 1350(b)(2). We have upheld the assessment of civil penalties under this statute for violation of similar safety regulations in a number of cases. *The Houston Exploration Company*, 169 IBLA 166, 176 (2006); *Petro Ventures*, 167 IBLA at 324-25 (failure to maintain operability of emergency shutdown station at offshore oil and gas facility); *Seneca Resources*, 167 IBLA at 12-13 (failure to ensure proper operation of automatic shutdown valve at offshore oil and gas facility); *Blue Dolphin Exploration Company*, 166 IBLA 131, 138 (2005) (misplacement of testing records designed to ensure compliance with MMS rules designed to limit risks to health, safety, and the environment); *W & T Offshore*, 164 IBLA at 199 (failure to have a portable gas detector for welding and burning operations); *Conn Energy, Inc.*, 151 IBLA 53, 63-64 (1999) (failure to regularly inspect safety equipment at an offshore oil and gas facility).

The facts in *Petro Ventures*, in particular, are similar to those here because both cases address the lessee's failure to ensure access to a safety control device from a remote location. In *Petro Ventures* we held that inoperable emergency shutdown (ESD) stations, which were manually operated from strategic locations to allow personnel to close valves and shutdown the rig, constitute a "dangerous situation":

. . . ESD stations are critical safety devices. When they are inoperable, they fail to function as intended and required by the [American Petroleum Institute Recommended Practice] and Departmental regulations. Inoperable ESD stations, for instance, prevent personnel from manually initiating platform shutdown when an abnormal condition is observed, clearly creating a threat to the safety of personnel and property associated with the platform, in violation of the Department's regulations. 30 CFR 250.803(c)(1). . . .

. . . .

The fact remains that the essential safety devices at the two ESD stations were inoperable for a period of 10 days because the bypass valve was closed, constituting a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment. MMS was authorized to exercise discretion in assessing the penalties for these violations . . . .

*Petro Ventures*, 167 IBLA at 323-25 (footnotes omitted). Moreover, in *Petro Ventures* there was no abnormal event occurring at the time the inoperable ESDs were discovered (*id.* at 317), whereas in the instant case, the remote control panel became inoperable during a loss of well control/shallow gas leak event.

[1] When the well was shut in by placing the diverter in “test” mode, the diverter could not be operated from the remote control station to reduce the pressure or close off the leak and the crew lacked the knowledge and training to adequately understand operation of the diverter system under those circumstances. Daley, the OIM, was unaware of how much pressure the leaking seals could withstand and, when he chose to shut in the well by placing the diverter in “test” mode, he was apparently unaware that the remote control panel located off the rig floor would become inoperable.<sup>13</sup>

Nevertheless, BP argues that the crew was fully trained and that the training regulation cannot be applied to violations within 2 weeks to 1 month after its effective date. SOR at 30-32. We disagree. BP and other lessees had been given advanced notice of a 2-year transition period to come into compliance with the training requirements (train all employees to competently perform their well control and production safety duties with proper verification). That period expired on October 15, 2002, at which time they were required to fully comply with the new rule. 30 C.F.R. § 250.1502. As stated by the Reviewing Officer: “While I understand that your employees had up-to-date training certificates, and that their training would be valid

<sup>13</sup> We agree with MMS that, based on evidence in the record, Daley was unaware of these aspects of the diverter system at the time he decided to shut in the well by placing the diverter in “test” mode. Daley, who “had the responsibility and authority to decide whether, and in what manner, to shut in the C-7ST well . . . [,] decided to shut in the well by placing the KFDJ diverter in ‘test’ mode.” Affidavit of John Daley, SOR Ex. 1 at 3. After the well was shut in and the crew was evacuated, subsequent unsuccessful attempts were made to control the diverter’s hydraulic regulator from the remote panel in Daley’s office, indicating lack of knowledge of its inoperability while in “test” mode. IADC Daily Drilling Report 14-Nov-02, AR 123; Diamond Memorandum at 1-2. BP’s objection to the Interview Summaries as reliable evidence is misplaced, given the other evidence on this issue, including that listed above.

and sufficient for normal drilling operations, the minute they were directed to use the ‘test’ mode of the diverter to shut in the well, they were outside of their training knowledge.” Final Penalty Assessment Decision at 4-5.

BP also argues that the diverter and training regulations in question apply only during drilling operations, and not during the cementing operations which were taking place when this incident occurred. BP asserts that the diverter regulation (and, as a consequence, the training regulation) apply only “[w]hen drilling a surface or conductor hole.” SOR at 26, *quoting* 30 C.F.R. § 250.409(a) (2002). BP concludes that the regulations are at least ambiguous and unclear as to what is required and present a “level of doubt [that] must be resolved in favor of the party from whom the penalty is sought.” SOR at 27-28. We reject this argument based on the same rationale we applied in *W & T Offshore*, a case with analogous facts and similar arguments. Thus, we agree with MMS that the provisions of 30 C.F.R. Part 250 (Oil and Gas and Sulfur Operations in the Outer Continental Shelf)<sup>14</sup> make clear that the diverter and training regulations in question apply to the operations taking place at the time of the incident. The safety provisions contained in that Part of the regulations<sup>15</sup> and in the OCSLA<sup>16</sup> leave no doubt that BP was required to follow the safety-related regulations concerning the diverter and training for which it was cited. Therefore, we agree with the Final Penalty Assessment Decision that both safety regulations were violated by BP.

BP nevertheless argues that a civil penalty should not be imposed because there was no actual threat of serious harm and because the gas leak and subsequent events were not caused by the actions of BP personnel or as a result of the cited violations. SOR at 12-21, 22-25. BP relies on the systems analysis report submitted by Bourgoyne following the incident which opined that “*neither shutting-in the well nor diverting the gas flow would have led to gas broaching to the surface* [because, *inter alia*, s]ignificant sand intervals were present both above and below the conductor casing shoe that were more than capable of dissipating any gas produced from the thin gas-bearing zone that caused the leak.” SOR at 13, *quoting* from BP’s Bourgoyne Report at 4 (BP’s emphasis). However, based on our above analysis, these arguments are

<sup>14</sup> Part 250 applies to, *inter alia*, offshore oil and gas development, and “development” is defined to include drilling and its associated activities. 30 C.F.R. § 250.101 (2002); 30 C.F.R. § 250.105 (2002); *see, e.g.*, 30 C.F.R. Part 250, Subpart D “Oil and Gas Drilling Operations” includes drilling operations, with both a well casing and cementing provision (30 C.F.R. § 250.404 (2002)) and a diverter systems provision (30 C.F.R. § 250.409 (2002)).

<sup>15</sup> *See, e.g.*, 30 C.F.R. § 250.107, applicable to OCS in general and § 250.400 (2002), applicable to control of wells during drilling operations.

<sup>16</sup> 43 U.S.C. §§ 1331-1356 (2000).

irrelevant to the question of whether the violations occurred; rather, they go to the severity of the violation. MMS is not assessing a civil penalty for the gas leak; it is assessing penalties for lessee's failure to comply with two safety regulations designed to protect the environment in the case of rig problems, which in this case occurred in the form of a gas leak. That lack of compliance – with the requirement to be able to control the diverter from a remote location, and with the requirement to have ensured that all safety personnel knew how to operate the diverter under these circumstances – constituted a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment.

MMS exercised its discretionary authority to assess civil penalties in furtherance of the objectives of the OCSLA, and that assessment “should be upheld if there is a ‘reasonable explanation’ for the agency’s decision and a demonstration that a ‘rational connection exists between its findings and the choice it makes.’” *Petro Ventures*, 167 IBLA at 325 (citations omitted). The Reviewing Officer stated her reason for assessing civil penalties in this case:

The goal of the Civil Penalty Program (Program) is to assure clean and safe operations through the pursuit, assessment, and collection of civil penalties. The Program is not static and needs to change to accommodate the dynamic environment of offshore oil and gas operations. When the MMS notices a recurring problem with operations, as it has with shallow gas hazards recently, it is the responsibility of the Program to take action. For that reason, it is appropriate for MMS to assess a civil penalty in this case.

Final Penalty Assessment Decision at 7. Consistent with the precedent cited above, MMS acted well within its authority to assess the penalties in this case.

BP claims that the penalty assessment matrix, and the PINC list of guidelines are substantive rules for which the APA requires promulgation with notice and comment before they can be used to assess penalties. We agree with MMS that these items fall within the APA's exception to promulgation for “interpretive rules, general statements of policy, or rules of agency organization, procedure or practice.” 5 U.S.C. § 553(b)(3)(A). As MMS states,

[t]he matrix used by the Reviewing Officer is an internal agency procedure to help insure consistency in penalty assessments. The categories [contained in the matrix] . . . stem from the categories that the statute and regulations provide. . . . The matrix, which only comes into play after the violation of a specific regulatory section has both occurred and been found to create either a risk or an actual harm, then sets the categories in ascending order of risk. . . . It then also considers

the violator's penalty history. . . . The matrix creates or imposes no duty, other than those already in the specific regulations. . . . The regulations themselves establish the basis of enforcement. . . . Finally, the matrix does not repudiate or change any of the existing, APA-compliant, regulations in Part 250. . . . See *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

Answer 25-26.<sup>17</sup> Further, MMS explains that the PINC guidelines “simply take the inspector step-by-step through the process of checking an item of machinery, etc. to insure that it complies with a specific regulation. . . . The *regulation* is the basis for the INC and the subsequent penalty assessment; the PINC guidelines do not alter or amend the APA-compliant regulations which are the basis for the agency enforcement.” *Id.* at 26-27. We find no basis for disagreement with MMS' analysis of these documents and agree that the penalty assessment matrix and the PINC list of guidelines both meet the criteria set out in *American Mining Congress* for interpretive rules, general statements of policy, or rules of agency organization, procedure or practice, and are thus not subject to the promulgation provisions of the APA.

BP also argues the Final Penalty Assessment Decision should have included new civil penalty worksheets rather than relying on those attached to the Proposed Civil Penalty Assessment, and that the latter do not support the Final Penalty Assessment Decision because it significantly reduced the penalties initially proposed. We disagree. The factors considered and the calculations made in assessing the proposed penalty amounts are shown in the Notice of Proposed Penalty Assessment and the attached worksheets. AR 174-178. The reductions and recalculations in the penalty amounts made by the Reviewing Officer were fully explained in her Final Penalty Assessment Decision, as noted above. Final Penalty Assessment Decision at 1-7. Moreover, it is clear from its SOR that BP was able to determine the proposed and revised calculations used in assessing the penalties. SOR at 5-6. Indeed, the reductions made by the Reviewing Officer in her Final Penalty Assessment Decision and requested later by MMS are in response to input BP provided in its response to the Proposed Decision.<sup>18</sup> Thus, the information, documentation and analysis used to assess the final penalty amounts is contained in the record and the Final Penalty Assessment Decision provides a detailed explanation of the factors considered in reducing the final penalty assessment from that initially proposed.

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<sup>17</sup> We affirmed a penalty applying MMS' Civil Penalty Guidebook in *Petro Ventures*, 167 IBLA at 325.

<sup>18</sup> Additional information detailing BP's civil penalties and compliance history and considered in assessing the penalties is contained in the Administrative Record at 303.

As stated, the Reviewing Officer substantially reduced her proposed penalty from \$270,000 to \$59,000 following BP's response to the proposed penalty. In addition MMS agrees with BP's argument that no violation of 30 C.F.R. § 250.1503(a) occurred on November 6, 2002, and "requests that the Board reverse the Final Decision only as to that violation and vacate the accompanying penalty assessment of \$18,000." Answer at 13 n.6. With these substantial reductions, we find that MMS has given due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the remaining civil penalties assessed. Thus, we hold that a civil penalty in the amount of \$41,000 is appropriate for the reasons stated herein and in the Reviewing Officer's Final Penalty Assessment Decision.

Any other arguments raised by appellant not expressly addressed in this opinion have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed, in part, as to the violation of 30 C.F.R. § 250.1503(a) (2002) on November 6, 2002, and the related penalty assessment of \$18,000 is vacated. The remaining civil penalties assessed in the amount of \$41,000 are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
R. Bryan McDaniel  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Lisa Hemmer  
Administrative Judge